No. 97-843

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

Aurelia Davis, as next friend of LaShonda D.,
Petitioner,

vs.

Monroe County Board of Education,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AND THE GEORGIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENT

Julie Underwood
National School Boards
Association
1680 Duke Street
Alexandria, Va. 22314
(703) 838-6710

*Lisa A. Brown**
Jennifer Jacobs
Bracewell & Patterson, L.L.P.
711 Louisiana, Suite 2900
Houston, Texas 77002-2781
(713) 223-2900
**Counsel of record*

Attorneys for Amici Curiae

QUESTION PRESENTED

Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which prohibits sex discrimination in federally funded education programs and activities, recognizes a cause of action for peer hostile environment sexual harassment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & ADMINISTRATIVE MATERIALS

OTHER

No. 97-843

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

Aurelia Davis, as next friend of LaShonda D.,

Petitioner,

vs.

Monroe County Board of Education,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE*
NATIONAL SCHOOL BOARDS ASSOCIATION *ET AL.*
IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District

of Columbia, Guam, Hawaii, and the U.S. Virgin Islands.[1] NSBA represents the nation's 95,000 school board members. These board members govern 14,772 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary school students in the nation.

NSBA strongly believes in the policy of non-discrimination behind Title IX of the Education Amendments of 1972. Resolutions adopted by NSBA's Delegate Assembly at its national convention have encouraged all public school districts to adopt policies against the sexual harassment of students or employees, to provide clear complaint procedures, and to institute in-service training programs for teachers, administrators, and students.

The National Association of Secondary School Principals consists of more than 40,000 middle level and high school principals and assistant principals. NASSP programs include the National Honor Society, the American Technology Honor Society, the

[1]The parties' written consent to the filing of this brief has been filed with the Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

National Alliance of Middle Level Schools, and the National Alliance of High Schools.

The American Association of School Administrators, founded in 1865, has a membership of more than 14,000 educational leaders across North America and other countries. AASA strives to improve the condition of children and youth, prepare schools and school systems for the next century, and connect schools and communities to enhance the quality and effectiveness of school leaders. AASA seeks to achieve the highest quality of public education through effective school leadership.

The Georgia School Boards Association is a voluntary organization of the state's 180 local boards of education. The mission of GSBA is to provide educational leadership, professional services, and support to school districts and to assist them in achieving their goal of quality education for children.

SUMMARY OF ARGUMENT

Congress did not pass Title IX to create a damages cause of action for students who are dissatisfied with student discipline in their schools. Under Title IX, a damages claim exists only when the administrative leadership of a school district sanctions a policy or practice of allowing students' genders to influence when and how discipline is administered. Any lesser standard would contravene the statute and this Court's precedents and would ignore this Court's admonishments that the federal courts avoid micromanagement of the public schools. The missing ingredient in Petitioner's argument is *any* indication that the school officials engaged in discrimination--that their alleged failure to respond was not merely negligent or senseless but was *discriminatory*. A Title IX plaintiff complaining about student misconduct must show that, *but for* her gender, the school's disciplinary response would have been different.

The Petitioner's proposal also must be rejected because it is, in essence, a strict liability proposal that would hold schools liable in damages for the isolated decisions of teachers who make erroneous discipline decisions. Title IX liability is tied to conduct

that can be fairly characterized as representing the policies of the grant recipient. The disciplinary decision of a teacher is no more binding on a school board than the harassment of the molesting teacher in *Gebser v. Lago Vista Indep. School District*, 118 S.Ct. 1989 (1998).

Petitioner's theory would have a serious financial impact on the nation's schools, contrary to the intent of the Congress in passing Title IX. The financial impact would be even greater in the student-on-student harassment context than in the teacher-student context because students outnumber teachers and are more likely to misbehave than adults. Was the act of pushing in the hallway "sexual harassment"--or was it merely pushing in the hall? Was after-school detention appropriate, or should a week-long suspension have been assigned? Which student was more credible? Neither Title IX nor this Court's precedents permit students to litigate such questions under the guise of a Title IX violation. Liability for damages under Title IX hinges on the existence of gender discrimination by the grant recipient--not on whether schools are successful in responding to allegations of student misconduct.

Refusal to create a new damages claim under Title IX will not encourage school officials to ignore discipline problems. Other types of legal consequences remain. Moreover, school officials have a moral and pedagogical incentive to respond to allegations of misconduct. Finally, across the nation, districts have responded to the challenge of sexual harassment by adopting strong anti-harassment policies and providing in-school prevention programs.

ARGUMENT

I. Title IX is not an all-purpose school safety statute; it is an anti-discrimination statute.

A. To state a claim for damages, a Title IX plaintiff must show that, *but for* her gender, the school district's response to her complaint would have been different.

Congress did not pass Title IX to create a damages cause of action for students who are dissatisfied with the state of student discipline in their schools. Consistent with its wording and history, Title IX is violated only when the administrative leadership of a school district sanctions a policy or practice of allowing students' genders to influence when and how discipline is administered. The Supreme Court has long recognized that the federal courts should

not micromanage the public schools or interfere with the implementation of disciplinary rules.[2] Absent evidence of illegal considerations, "[i]t is not the role of the federal courts to set aside decisions of school administrators which the Court may view as lacking a basis in wisdom or compassion."[3]

To state a Title IX claim for damages, a plaintiff must allege facts indicating that school officials intended to discriminate on the basis of the student's gender. This proposition is demonstrated by numerous cases involving Title IX. *See, e.g., Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994)[4]; *Rowinsky v. Bryan Indep. School Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996)[5]; *Ruh v. Samerjan*, 816 F.Supp. 1326 (E.D. Wis.

---

[2]*See Board of Educ. v. McCluskey*, 458 U.S. 966, 969-70 (1982); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

[3]*Wood v. Strickland*, 420 U.S. 308, 325 (1975).

[4]The student must allege "particular circumstances suggesting that gender bias was a motivating factor" behind the erroneous disciplinary decision. *Yusuf*, 35 F.3d at 715.

[5]The Title IX plaintiff must demonstrate that "the school district responded to sexual harassment claims differently based on sex," such as showing that the district turned a "blind eye" to assaults on girls but not assaults on boys. *Rowinsky*, 80 F.3d at 1016.

1993), *aff'd*, 32 F.3d 570 (7th Cir. 1994)[6]; *see also Pfeiffer v. School Bd. for Marion Center Area*, 917 F.2d 779, 785-86 (3d Cir. 1990).[7] The Title IX plaintiff must show that, *but for* her gender, the school's disciplinary response would have been different. Absent evidence of intentional discrimination based on gender, the judicial inquiry under Title IX must end.

The missing ingredient in Petitioner's argument is *any* indication that the school officials actually were motivated by discriminatory animus--that their alleged failure to respond was not merely negligent or senseless but was *discriminatory*. Title IX's protections arise only when gender is the motive behind a discriminatory act.[8] For example, in the Second Circuit case *Yusuf*

---

[6]"There is no support ... to justify a finding that the university defendants would have acted differently if a female, rather than a male, were charged with misconduct... A careful examination of the plaintiff's pleadings fails to disclose any suggestion that her complaints ... were intentionally mishandled because of either party's gender." *Ruh*, 816 F.Supp. at 1331.

[7]In analyzing whether punishment of a female student for premarital sex violated Title IX, the court of appeals held that the district court erred in excluding testimony regarding the discipline of a similarly situated male student. *Pfeiffer*, 917 F.2d at 785-786.

[8]*See Yusuf*, 35 F.3d at 715; *Rowinsky*, 80 F.3d at 1016.

v. Vassar College, 35 F.3d 709 (2d Cir. 1994), a male student alleged that his college imposed a stiffer penalty for male-to-female "sexual harassment" than it did for male-on-male physical assault. The court held that the student stated a Title IX claim because, assuming the truth of his allegations, his gender had affected the punishment he received. The court held that a student must allege specific facts raising an inference that gender bias was a motivating factor, such as "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Id.*

The Tenth Circuit employed a similar analysis in *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996), in which a male football player was subjected to an offensive hazing incident by other male football players. Football season was cancelled, which increased student hostility toward the student. He filed suit, complaining about the district's response to the alleged "hostile environment." The court of appeals rejected the student's claim because he failed to show that the school officials' conduct was based on his gender. The court noted that the student did not allege

that the school district would have acted differently "if a similar event had occurred in the women's athletic program."

The Petitioner's damages theory must be rejected because it eliminates the statutory requirement of actual discrimination by the grant recipient. Intent to discriminate is an essential element of this claim in two respects. First, proof of gender discrimination is necessary to prevent Title IX from usurping the traditional authority of school officials to manage the public schools. Congress did not mean for Title IX "to impair the independence" of schools in disciplining students. *Yusuf*, 35 F.3d at 715. Second, damages are not available under Title IX except in those instances involving intentional discrimination. *See Franklin v. Gwinnett County Public Schs.*, 503 U.S. 60, 74-75 (1992).

B. If Petitioner's Argument Prevails, It Will Be Tantamount To Creating a Minimum Disciplinary Code to Avoid Sexual Harassment Liability.

School discipline rules ultimately serve both a pedagogical and disciplinary function. Unlike adults in the workplace, juveniles have limited life experiences or familial influences upon which to

establish an understanding of appropriate behavior. The real world of school discipline is a rough-and-tumble place where students practice newly learned vulgarities, erupt with anger, tease and embarrass each other, share offensive notes, flirt, push and shove in the halls, grab and offend. In a special education program, student misbehavior could include a Tourette's Syndrome student's uttering continuous obscenities or an autistic student's sexually stimulating herself in the presence of other students. Confronted daily with a dizzying array of immature or uncontrollable behaviors by students, school officials must ferret out the false or trivial allegations from those that are true and serious.

Even when it is clear that a student has violated school rules, there are no federal sentencing guidelines for student discipline decisions--nor should there be. School officials necessarily must use their professional judgment and discretion in responding to complaints about student misconduct. They consider the student's age, history, and other factors. Such school officials usually employ progressive discipline, beginning with verbal directives, telephone calls to parents, after-school detention, class reassignment, short-

term suspension, and banishment from extracurricular activities and ending with expulsion or assignment to an alternative campus, if permitted by state law.

History shows that, no matter what a school official chooses to do, someone will be unhappy. Student offenders almost always view their punishment as too strict,[9] and student complainants almost always view an offender's punishment as too lax.[10] For example, in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). this Court considered the claim of a student who argued that his school had no right to discipline him for using sexual vulgarities. In contrast, the female student in the recent case *Fowler v. Bryan Independent School District*, 1998 Westlaw 350488 (Tex. App.--Houston [1st Dist.], July 2, 1998). had the opposite complaint: she

---

[9]*See, e.g., Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 679 (1986) (student alleged that punishment for use of sexual vulgarities was too harsh and violated his free speech rights); *McCluskey*, 458 U.S. at 967 (students complained about mandatory suspension rule); *Palmer v. Merluzzi*, 868 F.2d 90 (3rd Cir. 1989) (student complained that 60-day athletic suspension, in addition to 10-day academic suspension, was excessive).

[10]*See, e.g., Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d at 1006, 1008-1009 (5th Cir. 1996) (female complainants alleged that suspensions of male students were inadequate).

alleged that school officials did not do enough when other girls in her junior high class called her "virgin" and "vagina." Although the girls who teased her were given detention and although the complainant was reassigned to a new class and never reported further teasing, the complainant still filed a discrimination lawsuit against her school district.

Petitioner's support for her proposal is based in part on the Sexual Harassment Guidance recently adopted by the Office for Civil Rights. *See* Department of Education, Office for Civil Rights, Sexual Harassment Guidance, 62 Fed. Reg. 12034 at 12039 & 12042 (March 17, 1997) [hereinafter OCR Guidance]. Under the OCR Guidance, a "hostile environment" will exist if there are a "series of incidents"--even if they do not involve the same student and even if none of the separate incidents is serious. *See* 62 Fed. Reg. 12039, 12042. Under this theory, random acts of misconduct at different grade levels and different students supervised by different teachers may render the district liable in damages for a "hostile environment." A student also may state a claim even if she was not the target of the offending conduct or if she was subjected to a single

act of offensive touching. 62 Fed. Reg. at 12041. These examples are highly problematic. First, they *presume* that the mere existence of a "series" of misconduct incidents actually violates Title IX. Even the best schools have discipline problems, and it would distort the language and purpose of Title IX to hold schools financially responsible for the occurrence of such incidents. Second, these types of scenarios fail to satisfy this Court's "demanding" standard of actionable conduct even under Title VII, which is aimed at "extreme" conduct.[11] Third, damages are not allowed Title IX under *Franklin* unless there is proof of *intentional discrimination* by the grant recipient. The existence of a "series of incidents" does not establish this intent.

It bears stating the obvious: school officials have *no* incentive to tolerate misconduct in the schools. Student misconduct is not economically or professionally rewarding for teachers, and it does not improve test scores or help pass bond elections to build new schools. Fortunately, Title IX does not require that the federal courts take over the responsibility of managing student discipline in

[11] *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2283-94 (1998).

the public schools. Title IX is implicated if, and only if, the student discipline rules are administered in a manner that discriminates on the basis of gender.

II. Damages are available under Title IX only when *program administrators* engage in discrimination. Misconduct by teachers and students cannot result in liability.

A. School district liability may not be based upon the conduct of employees who lack administrative authority.

The Petitioner and United States argue that school districts should be held liable in damages when our teachers fail to respond to complaints about student misconduct. The Office for Civil Rights goes so far as to state that schools might be held liable for the decisions of a *cafeteria worker or school bus driver*. *See* OCR Guidance, 62 Fed. Reg. 12034 at 12039 & 12042. School district liability for damages, however, may not be based upon the conduct of school employees who lack administrative authority. Imposing liability at this level is, in essence, strict liability, which this Court clearly rejected in *Gebser*. The improper decisions of a classroom teacher are no more binding on the school board than were the

harassing acts of the adult molester in *Gebser*. Title IX liability must be tied to conduct that can be fairly characterized as representing the policies or practices of the federal grant recipient (in this case, the school board).

In *Gebser*, the Court was careful to craft a standard that avoided the "risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions." *Gebser*, 118 S.Ct. at 1999.[12] Accordingly, in *Gebser*, the Court focused instead on the knowledge and conduct of the principal who had authority over the teacher. When a school board hires its principals and superintendents, "it makes a deliberate considered judgment about what sort of leadership the district should have...." *Rosa H. v. San Elizario Indep. Sch. Dist.*,106 F.3d 648, 660 (5th Cir. 1997). This approach "locates the acts of subordinates to the board at a point where the board's liability and practical control are sufficiently close to reflect its intentional discrimination." *Id.*

[12] "When the school board accepted federal funds, it agreed not to discriminate on the basis of sex. We think it unlikely that it further agreed to suffer liability whenever its employees discriminate on the basis of sex." *Gebser*, 118 S.Ct. at 1998 (quoting *Rosa H. v. San Elizario Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997)).

at 660. Only when school leaders discriminate can the recipient be said to have violated the terms of the Title IX contract. *Id.* at 659-60.

This Court's precedents show that the proper focus in a Title IX (or Title VI) damages case is the institutional policies or practices of the grant recipient, not the isolated acts of individual employees. *See, e.g., Gebser*, 118 S.Ct. at 2000 (holding that the molester's knowledge of his own wrongdoing could not be imputed to the school district); *Guardians Ass'n v. Civil Service Comm. of New York*, 463 U.S. 582, 597 (1983) (White, J.) (questioning whether the grantee was aware that it was "*administering* the program in violation of the statute" and whether the plaintiff "has been intentionally discriminated against by the *administrators* of the program") (emphasis added); *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979) (admissions policy case; Congress wanted to avoid supporting "discriminatory practices"); *see also Franklin v. Gwinnett County Pub. Schs*, 503 U.S. 60, 64 & n. 3 (1992) (school administrators discouraged student from pursuing discrimination charge under Title IX); Comments of Rep. Mink, 117 Cong. Rec.

39252 (1971) ("Any college or university which has [a] ... *policy* which discriminates against women applicants...is free to do so" but should not ask taxpayers to support it) (emphasis added).

The statute and regulations support the conclusion that liability is limited to discriminatory decisions by program administrators. Title IX states that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any education program or activity* receiving federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). A "program or activity" refers to the "operations" of the "local educational agency." 20 U.S.C. § 1687. The phrase "local educational agency," in turn, is defined according to 20 U.S.C. § 8801. Section 8801(18) defines "local educational agency" as a "public board of education" or other "public authority" that has been given legal authority *by the state* for "administrative control or direction of" school services. *See also* 34 C.F.R. § 106.2(h) (1989) (defining "recipient" as any state or local political subdivision). School boards, superintendents, and principals have "administrative

control or direction of" school services. Teachers, bus drivers, and cafeteria workers do not.

In *Gebser*, the Court examined the administrative enforcement component of Title IX in 20 U.S.C. § 1682 to determine when recipients are on "notice" of a violation. *See Gebser*, 118 S.Ct. at 1999. Section 1682 states that the Department of Education must give notice of the violation to an "appropriate person" at the school district. The Court generally defined "appropriate person" as an "official of the recipient entity with authority" to stop the discrimination. *Id.* In the enforcement setting, the phrase "appropriate person" almost always refers to an official who has been handed actual administrative responsibilities by the grant recipient. When OCR wishes to notify a school district about a violation and the possibility of loss of federal funds, OCR invariably notifies the *superintendent*--not a fifth-grade teacher--about the entity's procedural and hearing rights under 34 C.F.R. § 106.71, 34 C.F.R. § 100.8, and 34 C.F.R. § 101.1 *et seq.* The risk of damages--like the cutting off of federal funding--cannot occur absent notice to a program administrator.

B. Agency theory and the identity of the "discriminator" are relevant.

The Petitioner and the United States erroneously argue that *Gebser* stands for the proposition that the identity of the "discriminator" is completely irrelevant and that the standard for damages is the same, regardless of whether the perpetrator is a student or a teacher. They confuse two separate questions: (i) whether a Title IX violation has even occurred and (ii) whether the school district may be held liable in damages for that violation. The "proper analysis" recognizes "the separate character of the inquiry into the question of municipal responsibility" and the question of whether a violation has occurred. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 114, 122 (1992).[13]

Gebser focused on the second inquiry. This lawsuit is predominantly about the *first* inquiry--whether a violation even occurred. While "agency" theory does not answer the second

[13] In *Collins*, the Court described the inquiry under 42 U.S.C. § 1983 as follows: "(1) whether Plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." 503 U.S. at 122.

inquiry, it helps answer the first inquiry. A school district can act only through its agents. The United States impliedly concedes this point when it argues that this lawsuit is not about a boy harassing a girl but, rather, is about the alleged failure of school officials--the district's agents--to stop the harassment.[14]

The identity of the "discriminator" is essential for defining the underlying violation--for defining the misconduct that needs remedying by the recipient. In *Franklin* and *Gebser*, the "agent" was the molesting school teacher. In the case at hand, the relevant "agents" are the school employees who allegedly failed to help LaShonda. It is *their* conduct--not the conduct of non-agents--that defines the potential violation. Only after establishing that an agent committed a violation does the Court proceed to the second inquiry--whether the entity may be held liable in damages for that violation.

This Court and the circuit courts have shown a reluctance in other contexts to hold public entities liable for the acts of non-

[14] The distinction is important in yet another respect. While a school district has real control over the "quality" of its workforce, it has no control over the "quality" of its student body. Most public schools are open enrollment institutions.

agents, even in cases of murder, rape, or assault.[15] An illustrative case is this Court's decision in *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1988), in which a state social worker negligently placed a boy with his abusive father, who battered the child nearly to the point of death. In rejecting the plaintiff's claim, the Court observed:

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation. *But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State ..., but by Joshua's father.*[16]

The same can be said about this case: the harm was inflicted by other students, not school officials. Although *DeShaney* was brought under 42 U.S.C. § 1983 and not Title IX, it vividly demonstrates the principle that emotion cannot play a role in the

---

[15]*See, e.g., Graham v. Independent Sch. Dist. No. I-89*, 22 F.3d 991 (10th Cir. 1994) (rejecting claim of parent of student murdered by another student known to be violent); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993) (rejecting claim of mentally retarded student who was raped in the showers by another student); *D.R. by L.R. v. Middlebucks Area Vocational Sch.*, 972 F.2d 1364, 1369 (3d Cir. 1992) (*en banc*) (rejecting claim of students who were molested by other students in classroom darkroom), *cert. denied*, 506 U.S. 1079 (1993).

[16]*Id.* at 202-03.

interpretation of federal law.

The Petitioner observes that certain regulations under Title IX hold grant recipients responsible for the acts of non-recipients. (Pet. Brief at 19.) The regulations in question apply to business transactions and relationships. *See, e.g.*, 34 C.F.R. § 106.32(c)(2), § 106.38. Such regulations merely echo this Court's admonishments that entities cannot avoid liability by *delegating* discriminatory programs to third parties.[17] They do not support a broad "environmental" cause of action based on student misconduct.

III. Congress did not intend to jeopardize school district funds in the absence of discriminatory conduct attributable to the recipient of the federal funds.

When a school accepts federal aid, it "weighs the benefits and burdens before accepting the funds." *Guardians Ass'n v. Civil Service Comm'n of N.Y.*, 463 U.S. 582, 596 (1983). If one of the "burdens" of accepting the funds is to guarantee that no student will ever behave badly toward another student, many school districts will

---

[17]*City of Los Angeles v. Manhart*, 435 U.S. 702, 718 n. 33 (1978). In *Manhart*, the Court recognized that Title VII "primarily govern[s] relations between employees and their employer, not between employees and third parties." *Id.*

simply reject federal money and attempt to make up the difference with an increase in local property taxes or other revenues sources. Surely Congress did not intend to *discourage* schools from accepting federal aid. *Cf. id.* 603 n. 24 (the "salutary deterrent effect of a compensatory remedy" may be "outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs").

In *Gebser*, this Court recognized that Congress did not intend to subject public schools to open-ended damages liability for acts of teacher-on-student sexual harassment. The financial impact is even *greater* in the student-on-student misconduct context. First, schools have more students than employees (nationally, students outnumber teachers by 17 to 1).[18] Second, on a daily basis, students are more likely to misbehave than adults. The potential number of

[18]For example, the Houston Independent School District in Houston, Texas, enrolls approximately 206,700 students and employs approximately 11,000 teachers. *See* Texas Education Agency, Division of Performance Reporting, *Snapshot '96: 1995-96 School District Profiles*, pp. 170-174. Nationally, the public schools enroll approximately 45 million children, and the pupil-teacher ratio is 17 students per teacher. *See The Mini-Digest of Education Statistics* [available on-line at http://nces.ed.gov/NCES/pubs98/MiniDigest97/98020-3.html].

wrongdoers--and claims--is staggering.[19] Although one obviously cannot predict future claims, we do know that, in 1992, there were no reported Title IX cases on student-on-student misconduct and that, today, there is a bumper crop of them. *See Davis v. Monroe County Board of Educ.*, 120 F.3d 1380, 1394 (11th Cir. 1997) (citing cases as of August 1997). The damages sought by LaShonda in this case--$500,000--would exceed the annual federal funding of a large number of school districts.[20]

School funds must be reserved for the education of children. Congress did not intend to jeopardize school district funds in the absence of discriminatory conduct attributable to the recipient of the federal funds. When large damages verdicts are awarded against a

[19]The risk of increased litigation is further enhanced by the recent decision regarding same-sex harassment in *Oncale v. Sundowner*, 118 S.Ct. 998 (1998). After *Oncale*, all types of student discipline issues will be litigated under the guise of an alleged Title IX violation, regardless of the genders of the students involved.

[20]Nationally, total federal revenues as a percentage of all revenues for all public schools is 6.8 percent. *The Mini-Digest of Education Statistics 1995* [available on-line at http://nces.ed.gov/NCES/pubs98/MiniDigest97/98020-5.html]. The school district in *Gebser* received about $120,000 in federal funds. *See* Texas Education Agency, *supra* note 20, at 314-318. According to figures supplied by the Monroe County school district, it received approximately $679,000 in federal aid in 1992-93.

school district, "everyone but a random plaintiff loses." *Leija v. Canutillo Indep. Sch. Dist.*, 887 F.Supp. 947 (W.D. Tex. 1994), *rev'd*, 101 F.3d 393 (5th Cir. 1996).

IV. During 1992-93, school districts were not on notice that Title IX governed the issue of student-on-student misconduct. There were *no* federal guidelines on sexual harassment of students until 1996.

Both the Petitioner and the United States suggest that the Department of Education has had a "longstanding" position concerning liability for sexual harassment and that school districts in 1992-93 knew about this potential liability. The *Amici*, who collectively represent thousands of schools and school leaders in this nation, strongly dispute this contention. The first reported case involving student-on-student misconduct under Title IX did not appear until August 30, 1993.[21] Even after that case and a subsequent decision that rejected Title IX liability,[22] the Department

[21] *Doe v. Petaluma City Sch. Dist.*, 830 F.Supp. 1560, 1573 (N.D. Cal. 1993), *reconsidered and revised*, 949 F.Supp. 1415 (N.D. Cal. 1996).

[22] *See, e.g., Garza v. Galena Park Indep. Sch. Dist.*, 914 F.Supp. 1437 (S.D. Tex. 1994).

of Education waited another three years before preparing any policy guidance, which the Department finally distributed to the *Amici* and other interested parties in August 1996. *See* Office for Civil Rights, Sexual Harassment Guidance, 61 Fed. Reg. 42728 (Aug. 14, 1996).

Although the issue of "notice" is addressed in the Brief of Respondent, the *Amici* write to underscore the fact that the Government's interpretation of Title IX is a new one that, if adopted by this Court, would constitute a substantive change in the law.

V. School districts have responded to recent concerns about student misconduct and harassment by adopting policies and providing training to staff and students.

School districts have not turned a blind eye to concerns about student-on-student misconduct. To the contrary, they have responded to the challenge of harassment in the schools with a wide variety of policies, programs, and training materials and videotapes designed to help school employees with the prevention and investigation of harassment allegations. Seminars and age-appropriate materials for students also are now widely available. Such programs and materials were unheard of 10 years ago.

The National School Boards Association's manual on the

prevention of sexual harassment by school employees, entitled *Sexual Harassment in the Schools: Preventing and Defending Against Claims*, was published in 1993. This year, NSBA published *Student-to-Student Sexual Harassment: A Legal Guide for Schools*, its first manual on the prevention of student harassment claims. NSBA also recently collaborated with the National Women's Law Center on the monograph *Righting the Wrongs: A Legal Guide to Understanding, Addressing, and Preventing Sexual Harassment in the Schools*. These monographs contain model policies and provide practical advice for the prevention and investigation of complaints.

Most school districts have adopted policies and procedures similar to those made available by the National Education Policy Network. These sample policies, an example attached hereto as Appendix A, form the basis of many school board resolutions across the United States. Notwithstanding the adoption of these strong policies, school districts in the future will continue to face incidents of student misconduct and, in some instances, those instances may be inadequately addressed. For the reasons previously discussed, however, Title IX liability is inappropriate and unwarranted.

Limiting school district liability for claims based on student misconduct is not an invitation to the nation's school authorities to ignore discipline problems. School districts that have a practice of discriminating against students may be investigated by the OCR, may lose their federal funding, may be directed to make changes in their procedures or policies, and may be sued for damages when intentional discrimination by school authorities is established. Students also may file criminal charges or lawsuits directly against their student perpetrators' parents. Expansion of Title IX is neither mandated nor warranted. Rather than eliminate student misconduct, Petitioner's standard will divert money away from the programs and efforts designed to help schools tackle this issue.

CONCLUSION

The judgment of the court of appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

Julie Underwood
National School Boards Association
1680 Duke Street
Alexandria, Va. 22314
(703) 838 6710

*Lisa A. Brown**
Jennifer Jacobs
Bracewell & Patterson, L.L.P.
711 Louisiana, Suite 2900
Houston, Texas 77002-2781
(713) 223-2900

**Counsel of record*

Attorneys for Amicis Curiae
National School Boards Association
National Association of Secondary School Principals
American Association of School Administrators
Georgia School Boards Association

APPENDIX A
SAMPLE SCHOOL NONDISCRIMINATION POLICY

NEPN/NSBA National Education Policy Network of the National School Boards Association	NEPN Code: AC

NONDISCRIMINATION ON THE BASIS OF SEX

All persons associated with the district community including, but not limited to, the Board, the administration, the staff, and the students are expected to conduct themselves at all times so as to provide an atmosphere free from sexual harassment. Any person who engages in sexual harassment while acting as a member of the school community will be in violation of this policy. All matters involving sexual harassment complaints will remain confidential to the extent possible.

Definition of Sexual Harassment: Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature may constitute sexual harassment where:

- Submission to such conduct is made either explicitly or implicitly a term or condition of a person's employment or participation in an educational function, or

- Submission to or rejection of such conduct by an individual is used as the basis for employment or decisions affecting such individual's education, or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work or educational performance or creating an intimidating, hostile, or offensive working or educational environment.

The Hearing Officer: The director of employee and student relations of the district will serve as the harassment hearing officer vested with the authority and responsibility of processing all sexual harassment complaints in accordance with the procedure set out below.

Procedure:

- Any member of the district community who believes that he/she has been subjected to sexual harassment is to report the incident(s) to any district administrator. The administrator is to contact the hearing officer.
- The hearing officer will attempt to resolve the problem in an informal manner through the following process:

- The hearing officer will confer with the charging party in order to obtain a clear understanding of that party's statement of the facts.
- The hearing officer will attempt to meet with the charged party in order to obtain his or her response to the complaint.
- The hearing officer may hold as many meetings with the parties or gather whatever additional evidence as is deemed necessary.
- On the basis of the hearing officer's perception of the situation, he or she may:
  - attempt to resolve the matter informally through conciliation; or
  - report the incident and transfer the record to the Board or its designee, and so notify the parties by certified mail.